In the Supreme Court
Appeal from the district court
Judge Ruth Garrett

The People of the State of Michigan,

Plaintiff-Appellant,

vs

Docket No. 126756

Kimberly D. Starks,

Defendant-Appellee.

Appellant's Brief on Appeal

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Statement of jurisdiction

This Court has jurisdiction over this case by virtue of MCR 7.301, MCR 7.302, and the Court's October 28, 2004 Order granting leave to appeal.

Statement of question presented

I. **An assault with intent to commit sexual penetration may be shown by an attempted battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. Here, a juvenile home counselor cornered a thirteen-year-old ward of the State, ordered him to take down his pants, and positioned herself to perform fellatio on the minor when she was then interrupted. Since the circumstances indicated that the child acted only at the command of the Defendant and he expected the Defendant to perform fellatio on him — a harmful touching — was there sufficient probable cause to warrant an order to stand trial for assault with intent to commit criminal sexual conduct involving penetration?**

The People say: "Yes."
Defendant will say: "No."

Statement of facts

Procedural history

After a preliminary examination held on September 20, 2001, District Judge Ruth Garrett refused to bind Defendant over on a charge of assault with intent to commit criminal sexual conduct involving penetration. MCL 750.520(g)(1); 1a, 35a-41a.

The People appealed as of right, and in an Order dated March 8, 2002, Circuit Court Judge Vonda R. Evans affirmed. 43a, 64a.

The People sought leave to appeal to the Court of Appeals, but in an Order dated May 3, 2002, a panel of the Court denied leave to appeal "...for lack of merit in the grounds presented." 67a.

The People applied for leave to appeal to this Honorable Court, and "...in lieu of granting leave to appeal...," this Court remanded to the Court of Appeals "...for consideration as on leave granted." 68a. The Order read further that:

> In determining whether the district court abused its discretion in refusing to bind defendant over on a charge of assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1), the Court of Appeals shall address whether the prosecution presented sufficient evidence to establish a criminal assault. See *People v Worrell*, 417 Mich 617 (1983).

Id.

In fidelity to this Court's Order, a panel of the Court of Appeals issued the Opinion now before the Court. 69a-72a. That Panel, as do the People now, urge this Court to consider overruling *Worrell* and thereby follow the majority of the states whose view is that a minor may not consent to an unlawful sexual touching. *Id.*

Preliminary examination testimony

Donavonne Manigault was employed at the Pause Program at Herman Keifer Hospital on June 30, 2001. The Program is a secure environment for delinquent boys. Manigault knew the Defendant, an employee of the facility, and the victim, Jonathan Jones, a resident of the facility. Manigault took a break from his floor duty and went downstairs to smoke a cigarette. Upon his return, Manigault noticed that Defendant was not on the floor or anywhere in the unit, which Manigault described as unusual. 6a-7a.

Manigault went to find Defendant and ultimately found her in the laundry room. The laundry room door was closed and locked. When laundry is being done, the door to the laundry room is usually left open; if not, the laundry room door is closed as residents aren't allowed access to it and are not allowed to do their own laundry. 7a-8a.

Manigault opened the laundry room door with his key and entered. Manigault saw the Defendant bent over "in front of a washing machine," with Jonathan Jones "standing behind her." Manigault did not know for sure what Defendant was doing, but she was less than two feet away from Jones when Manigault made his observation. Manigault testified that it was hard to explain what he saw, and that it was best demonstrated. Jones's belt was unbuckled, his pants were unbuttoned, his zipper unzipped, and he was holding his pants up to prevent them from falling down. Manigault, who observed Jones from the side, thought Jones's underpants were still on, but he was not sure of this. Manigault asked what was going on and made a report of the incident. Due to his vantage point, Manigault could not tell for sure if Defendant actually made contact with Jones. 8a-10a.

13-year-old Jonathan Orlanda Jones was a resident of the Pause Program and identified Defendant as a former child care worker for the Program. "Something" happened between the two in the laundry room. Just before "something" happened, Jones was in the laundry room with Defendant and another resident, Joseph Saborski. Jones and Saborski were washing their clothes and Defendant was monitoring them. Jones had some clothes to wash, but he had no intention of washing the clothes he had on. 11a-12a.

Defendant told Saborski to leave the laundry room, and Saborski did as he was told. Defendant closed the laundry room door, which meant that it was locked. Once the two were alone, Defendant asked Jones if he wanted his "dick" sucked like Dorean's.[1] Jones made no reply. 12a-14a, 16a-21a.

Defendant ordered Jones to pull down his pants. Jones did as he was told. Jones unfastened his belt and pants. Just as Defendant was about to put her mouth on Jones's penis, Manigault walked into the room. Defendant immediately began cussing at Jones in an effort to conceal her actions. Manigault wanted to know what was happening between the two. 14a-15a, 21a-23a.

Jones admitted on cross that he was taking medication for an "anger problem." Jones reiterated that Defendant ordered Saborski out of the laundry room before asking him if he wanted his "dick sucked like Dorean's". Defendant ordered Jones to pull down his pants, and Jones complied. Defendant was about to come in contact with Jones's penis, but she never did

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[1]Dorean Dillard was another resident in the program and Jones and another resident named Chevez Graves had previously seen Defendant with her mouth on Dillard's penis. Dillard was standing in front of Defendant, who was sitting on Dillard's bed, when the sexual act was performed. Jones and Graves each looked through different windows on separate doors when they made their observations.

because Manigault walked in on the two. Defendant did not "threaten" Jones to get him to remove his pants. 19a-22a.

Jones said nothing when Manigault walked into the laundry room even though his pants were down. Jones testified that Defendant made it appear as though she was putting clothes into the washing machine when Mangault walked in on the two. Jones also testified that Defendant made it look like Jones had done something to her — Defendant said "What are you doing? What the fuck are you doing? You mother-fucker!" 22a-23a.

Jones never told anyone that Defendant was kneeling in front of him. But, the day after this incident, Jones told his supervisors at a group meeting that Defendant was kneeling down in front of Dorean during *that* incident. Jones also testified on cross that he never exposed himself to the Defendant nor touched her in any inappropriate way. 23a-27a.

Jones admitted that he had been a patient at Hawthorne Hospital for anger problems and for running away. Jones reported the incident in the laundry room only after Defendant wrote him up. Jones hid in the air vent after being written up. Jones volunteered that he hid in the vent because Defendant got in trouble for the laundry room incident. Jones said that Defendant had never before written him up, nor had she evert attempted this type of act with him before. 27a-30a.

On redirect, Jones testified that he did not say anything about what happened in the laundry room until a subsequent group meeting on another day. 31a-33a.

On the People's motion to bind over, the defense objected, stating:

> MS. WOODS: Where is the assault? The evidence that this Honorable Court has before it, if you believe the testimony of this young man, is that Miss Starks made some suggestion that she

would do some act to him, and in that process told him unbuckle your pants, or take off your pants, or take your pants down.

Mr. Manigault, as I recall the testimony, said that the pants weren't down. They were open somehow. *But the evidence further before this Honorable Court is that she didn't touch him. She didn't coerce him. She didn't threaten him, so, and there is no testimony before this Honorable Court that he was in fear in anyway of her.*

33a-34a, emphasis supplied.

The district court consulted CJI2d 20.17, the instruction[2] on assault with intent to commit criminal sexual conduct involving penetration, and read the instruction into the record. 35a-38a. The following colloquy was then had between the court and counsel:

Now the question before this Court is was the complainant in fear, and there is no testimony on the record that he was placed in fear of any battery. He pulled down his pants.

MS. WEINGARDEN: Judge, if that's how you're ruling, could I call the complainant back and ask him that specific question?

MS. WOODS: I object. The proofs are closed and the Court is making its ruling on the issue.

This could have been asked of him. There was an opportunity.

THE COURT: The Court in this particular – If this was a criminal sexual conduct first degree, the authority of the defendant

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[2]In *People v Petrella*, 424 Mich 221, 277 (1985), this Court said:

Moreover, we remind the bench and bar once again that the Michigan Criminal Jury Instructions do not have the official sanction of this Court. Their use is not required, and trial judges are encouraged to examine them carefully before using them, in order to ensure their accuracy and appropriateness to the case at hand.

would have been an element or a factor to take a CSC three to a CSC one. However, *there is nothing on this record that he was placed in fear.*

A battery is a forceful violent touching of a person.

The Court does not believe that the proofs have been established to show that there is probable cause that a crime was committed. There is no – *There is no evidence of the defendant [sic] being placed in fear.*

This matter is dismissed.

39a-40a, emphasis supplied.

The People's appeal as of right to the circuit court

The People took an appeal as of right from the district court's refusal to bind Defendant over. Both parties filed briefs on appeal and appeared in court on March 1, 2002 to argue their respective positions. The People argued that Defendant's actions constituted an attempt to commit a battery,[3] while the defense argued that there was no threat of force or violence so that at best, all the prosecution had was Defendant "preparing" to commit "the act."[4]

Prior to ruling, the circuit court judge acknowledged the pertinent facts of the case.[5] The court then said:

But, in fact, it was quite clear that with the charge as charged, that *there has to be some type of battery. And the Court agrees with the legal analysis of the prosecution of what defines battery. But the issue then becomes whether there was an overt act in perpetration [sic] of this particular incident. And the Court*

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[3]46a.

[4]48a-49a.

[5]49a-52a.

> *believes that directing the young man to undo his pants, to take down his underwear without more is insufficient.*
>
> As to the issue of - - *The Court believes that there was, in fact, no overt act that - - done in perpetration [sic] of the particular act for the assault.*

52a, emphasis supplied.

Later, the circuit court judge restated its ruling as follows:

> The Court is not satisfied that there is an overt act that is done by the defendant in preparation for this particular offense based upon the reading of the transcript, and that's my ruling.

64a.

As explained in the procedural section of this Statement of Facts, leave to appeal to the Court of Appeals was denied, after which, pursuant to the People's Application for Leave to Appeal to this Court, this Court remanded to the Court of Appeals as on leave granted. The Court of Appeals having ruled, the issues are now properly before this Court.

Argument

I. An assault with intent to commit sexual penetration may be shown by an attempted battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. Here, a juvenile home counselor cornered a thirteen-year-old ward of the State, ordered him to take down his pants, and positioned herself to perform fellatio on the minor when she was then interrupted. Since the circumstances indicated that the child acted only at the command of the Defendant and he expected the Defendant to perform fellatio on him — a harmful touching — there was sufficient probable cause to warrant an order to stand trial for assault with intent to commit criminal sexual conduct involving penetration.

Standard of review

Review of the district court's decision whether or not to bind a defendant over for trial is for an abuse of discretion. An abuse of discretion occurs when the district court refuses to fulfill its statutory duty to bind the defendant over to stand trial upon presentation of sufficient proof that a crime was committed and that there is probable cause to believe that defendant committed it.[6] This Court reviews any question of law de novo.[7]

Discussion

The elements of assault with intent to commit criminal sexual conduct were stated by the Court of Appeals in *People v Snell*[8] as follows:

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[6]*People v Kieronski,* 214 Mich App 222, 228 (1995). And while questions relating to binding a defendant over for trial are reviewed for an abuse of discretion, this standard is transgressed *per consequens* where sufficient evidence to bind over the defendant is presented at the preliminary examination but the district court nevertheless refuses to fulfill its statutory duty. MCL 766.13. *People v Harris*, 159 Mich App 401, 406-407 (1987); *Wayne County Prosecutor v Recorder's Court Judge*, 101 Mich App 772 (1980).

[7]*People v Holtschlag*, 471 Mich 1, 4-5 (2004).

[8]*People v Snell*, 118 Mich App 750, 754-755 (1982). Emphasis supplied.

> Specifically, the elements of assault with intent to commit CSC are as follows: (1) there must be an assault. (2) There must be a sexual purpose. When the act involves penetration, defendant must have intended an act involving some sexually improper intent or purpose. When the act involves contact, defendant must have intended to do the act for the purpose of sexual arousal or sexual gratification. (3) When the act involves penetration, the intended sexual act must have been one involving some actual entry of another person's genital or anal openings or some oral sexual act. When the act involves contact, defendant must have specifically intended to touch the complainant's genital area, groin, inner thigh, buttock, breast, or clothing covering those areas, or defendant must have specifically intended to have the complainant touch such area on him. (4) There must be some aggravating circumstances, e.g., the use of force or coercion. An actual touching is not required. *When the act involves penetration, it is not necessary to show that the sexual act was started or completed.*

In *People v Nickens*,[9] this Court *rejected* the Court of Appeals' interpretation of MCL 750.520g(1) as requiring the above four elements. Instead, after noting that the Court had never had occasion to formally delineate the elements of this offense, this Court ruled that there are only two elements: (1) an assault, and (2) an intent to commit criminal sexual conduct involving sexual penetration. *Id.* This appeal involves the assault element, and, in particular, whether a minor may consent to a criminal sexual contact involving penetration. In *Nickens*, Justice Cavanagh, writing for a unanimous Court, stated that:

> Likewise, if the actor overcomes the victim by coercion, a nonconsensual and harmful touching has occurred. 'The application of force to the person of another is not unlawful, — and, therefore, not a battery — if the recipient consents to what is done, provided this consent (1) is not coerced or obtained by fraud, (2) *is given by one legally capable of consenting to such a deed, and (3) does not relate to a matter as to which consent will not be recognized as a matter of law.*' Perkins & Boyce, Criminal Law

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[9] *People v Nickens*, 470 Mich 622, 627 (2004).

(3d ed, 1982), p 154 [emphasis changed from original text]. As such, the criminal law views coerced consent as no consent at all.

The only element in question here is the assault, and secondarily, whether the minor consented to an unlawful touching. An assault may be committed in either one of two ways: (1) by an attempt to commit a battery, or; (2) by an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *Id.,* at 470 Mich 628.

A "battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person." *Id.*[11]

An assault was committed here. Defendant used her position of authority over the minor to attempt to commit a battery, or, Defendant committed an unlawful act — propositioning a minor — that created a reasonable apprehension of an immediate battery. Defendant intended a wilful touching of the minor's privates and took steps to effectuate that intent.

The minor's reasonable apprehension was demonstrated by the fact that he said and did nothing when Defendant inquired if he wanted his penis "sucked like Dorean's." He simply "froze." The minor undid his pants *only* after Defendant ordered him to do so. And the reasonable apprehension of receiving an immediate battery was further demonstrated by the ward's freezing-up upon Manigault's entry into the room. In short, the victim was scared and unsure about what to do.

And as for the attempted battery version of an assault, the attempt, as it were, need not necessarily result in injury to the person battered.[12] But even if required, however, the injury

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[11]Quoting *People v Reeves*, 458 Mich 236, 244 (1988).

[12]*People v Terry,* 217 Mich App 660, 662-663 (1996), relying in part on *People v Datema*, 448 Mich 585, 592 (1995), n 8.

need not be of a physical nature.[13] Like so many molestations of young children in today's society, the injury to the victim here was to his psyche as demonstrated by his subsequent conduct in secreting himself in an air-duct vent when the incident was reported.

More importantly, with regard to the question of consent, either it is not an issue because the minor was incapable of consenting for the reasons cited by the dissent in *Worrell*, or because, even if the minority view is followed,[14] consent is, or should be, a question of fact to be decided by the trier of fact at a trial, not by the district judge at the preliminary examination stage of a criminal proceeding. Under either scenario, an assault was committed by the Defendant here.

As for the second element, quite obviously, Defendant had a sexual purpose for her actions and intended to commit a sexual act involving penetration. Where, as here, the act charged involves penetration, it is not necessary to show that the sexual act (penetration) was in

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[13]*People v Petrella*, 424 Mich 221 (1985).

[14]As did the dissent in *Worrell*, the People argue that the majority view is the better reasoned approach in this context. For instance, while an athlete obviously consents to certain batteries that ordinarily occur during the gamesmanship of sport, where sexual misconduct with a minor is involved, such a child may not consent to the intended battery as a matter of law for the obvious public policy reasons.

In addition to the cases cited by the dissent in *Worrell*, see *State v Anderson*, 222 NW2d 494, 495-496 (Iowa, 1974) (There may be an assault with intent to rape on a consenting female where she is under the age of consent, since in law, she cannot consent to such an assault; noting the preponderance of authority); *People v Parker*, 74 Cal App 540, 545; 241 P 401 (1925) ("...where the female is under the age of consent there may be an assault with intent to commit rape notwithstanding her actual consent" because ..."in such cases the female cannot consent to the assault." "The law resists for her."; *Fannin v State*, 88 P2d 671, 675 (Okla, 1939) ("...the law conclusively presumes, that the female being [underage], is incapable of consenting and therefore the act is by force and violence."; *Moody v State*, 91 Ga App 138, 140; 85 SE2d 61 (1954) ("Where the female is under the age of 14, the law conclusively presumes that a sexual encounter is against her will, she being unable to consent."); *Hall v State*, 40 Neb 320; 58 NW 929, 931 (1894) (no force on the part of the defendant, or resistance on the part of the female victim, is essential to constitute the crime of assault with intent to commit the crime of rape where the victim is under the age of 16).

fact started or was in fact completed.[15] This is so because, once started, the act is no longer an attempted battery, but a completed battery.

There is no doubt, then, that the People presented sufficient evidence to bind Defendant over to stand trial as charged.[16] Accordingly, the district court abused its discretion by refusing to fulfill its statutory duty to bind Defendant over to stand trial as charged. And the circuit court clearly erred in not reversing the district court's ruling. Because the People presented sufficient evidence, and because the district court and the circuit court were acting under a misapprehension of the law,[17] this Court should reverse and remand with instructions to bind Defendant over to stand trial as charged because this type of criminal sexual conduct should not be condoned in state-run facilities where adult supervisors are supposed to be setting a good example for troubled youths.[18]

Worrell should be overruled, and the lower courts reversed. Accordingly, the People respectfully request same.

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[15]*People v Snell, supra,* at 118 Mich App 755.

[16]Any argument that defendant's actions amounted to "mere preparation," as was argued by defendant below and found by the circuit court, is patently absurd. By that standard, defendant would have been "merely preparing" to commit an assault with the intention of committing a criminal sexual conduct involving penetration up to and until such time as defendant actually began performing fellatio on the victim. As has been demonstrated in this Brief, at that point we would no longer be looking at an assault with the intent to commit criminal sexual conduct involving penetration, but at the actual crime of criminal sexual conduct in the first-degree because we would have a completed "attempted battery."

[17]Eg, *People v Cress*, 250 Mich App 110, 149 (2002), *rev'd on other ground at* 468 Mich 678 (2003) (a trial court's misunderstanding or misapplication of the law may constitute an abuse of discretion).

[18]This Court may recall similar allegations of inappropriate behavior between a social worker and a juvenile in *People v Petty*, 469 Mich 108 (2003).

Relief

Wherefore, the People respectfully request this Honorable Court to overrule *Worrell* and to adopt the majority view of our sister states who have held that an underage youth may not consent to an unlawful touching. Accordingly, the People request that this Court reverse the lower courts and remand to the district court with instructions that the court is to bind Defendant over to stand trial forthwith and to execute the necessary paperwork to give the circuit court jurisdiction to proceed with any pre-trial and/or trial proceedings, as the case might be.

Respectfully submitted,

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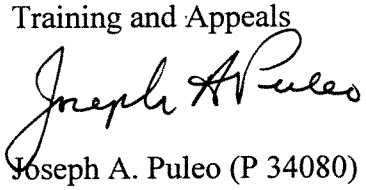

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